MOTION FILED
MAR 10 1993

No. 92-1149

In The

Supreme Court of the United States

October Term, 1992

GLEN MAC MURDOCK, JR., et al.,

Petitioners,

vs.

UTE DISTRIBUTION CORPORATION, a Utah Corporation; MANUAL J. LUJAN, Secretary of the United States Department of the Interior,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

MOTION OF UTE INDIAN TRIBE FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN OPPOSITION TO PETITION FOR WRIT OF *CERTIORARI* AND *AMICUS CURIAE*

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MOTION OF UTE INDIAN TRIBE FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI*

The Ute Indian Tribe of the Uintah and Ouray Reservation, Utah, (the "Tribe") through its attorneys and pursuant to Supreme Court Rule 37.4, respectfully moves this Court for leave to file a brief as *amicus curiae* in opposition to the Petition for Writ of *Certiorari*. Letters from counsel for the Respondents, the Ute Distribution Corporation and the United States, consenting to the Tribe's participation in this proceeding as *amicus curiae* are included in Appendix A to the *amicus* brief included with this motion. *See* S.Ct. Rule 37.2. Counsel for the Petitioners, the Affiliated Ute Citizens, Glen Mac Murdock, and Mac Eugene Murdock refused to consent to the Tribe's participation. The nature of the Tribe's interest, set forth below, will provide this Court with a unique perspective from which to review the issues raised in this proceeding.

DISCUSSION

The question presented in the Petition for Writ of *Certiorari* is whether this Court's decision in *Affiliated Ute Citizens of the State of Ute v. United States et al.*, 406 U.S.

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* The Tribe was named as an Appellee before the Tenth Circuit and joined in the joint brief filed by the Ute Distribution Corporation and the United States. Therefore, although not named as a Respondent in the Petition, the Tribe qualifies as a party to this proceeding. *See* S.Ct.Rule 12.4.

128 (1972), holding that the Ute Distribution Corporation is the authorized representative of the mixed-blood Ute Indians for purposes of jointly managing indivisible assets of the Ute Indian Tribe under the Ute Partition Act, 25 U.S.C. §§ 677-677aa, precludes the Affiliated Ute Citizens and its privies from relitigating the question of its authority to jointly manage those assets. The Tribal Business Committee is the governing body of the Tribe, *see* Article III, Section 1, Constitution and By-Laws of the Ute Indian Tribe of the Uintah and Ouray Reservation, and is authorized to manage the indivisible assets of the Tribe by section 10 of the Ute Indian Supervision Termination Act of August 27, 1954, 68 Stat. 868, as amended, codified at 25 U.S.C. §§ 677-677aa (the "Ute Partition Act").

Since 1959, the Ute Tribal Business Committee has jointly managed the indivisible assets of the Tribe with the Ute Distribution Corporation (the "UDC") in accordance with the terms of the Ute Partition Act. In 1972, this Court held that the UDC, as opposed to the Affiliated Ute Citizens (the "AUC"), was entitled to manage the indivisible assets of the Tribe with the Tribal Business Committee. *See Affiliated Ute*, 406 U.S. at 144. The United States has established regulations that recognize the authority of the Tribal Business Committee on behalf of the full-bloods, and the UDC on behalf of the mixed-bloods to jointly manage the indivisible tribal assets as described in the Ute Partition Act. *See* 25 CFR Part 217 (1992).

The Tribe has cooperated and jointly managed the indivisible tribal assets with the UDC for more than 40

years. Its reliance on the legitimacy of the UDC to act as the mixed-blood's authorized representative has been confirmed by this Court in *Affiliated Ute*, the Court of Appeals for the Tenth Circuit,** the District Court for the District of Utah,*** and the Department of the Interior.**** The Tribe is vitally concerned that its interests developed over the past 40 years and its joint management of the Tribe's most valuable resources not be disrupted. It maintains a significant interest in ensuring that the judgment of this Court in *Affiliated Ute*, on which the Tribe has relied, not be altered and is protected from collateral attack. Petitioners should not now be permitted to deny this Court the opportunity to hear from the Tribe, with whom the Petitioners incorrectly allege they share responsibility for managing the indivisible assets of the Tribe.

WHEREFORE, the Ute Indian Tribe of the Uintah and Ouray Reservation, Utah, respectfully requests that this

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** *See Murdock v. Ute Indian Tribe*, 975 F.2d 683 (10th Cir. 1992); *Maldonado v. Hodel*, 89-4035, Slip Op. (10th Cir. June 28, 1990); *aff'g* 683 F.Supp. 1322 (D. Utah 1988).

*** *See Ute Distribution Corp. v. United States*, 721 F.Supp. 1202 (D. Utah 1989), *rev'd on other grounds*, 938 F.2d 1157 (10th Cir. 1991); *Hackford v. First Security Bank*, 521 F.Supp. 541 (D. Utah 1981).

**** *See* 25 CFR Part 217. *See also Affiliated Ute*, 406 U.S. at 144, wherein this Court discussed actions taken by Congress in reliance on the legitimacy of the UDC.

Court GRANT its Motion to File Brief *Amicus Curiae* in Opposition to the Petition for Writ of *Certiorari*.

Respectfully submitted,

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INTEREST OF AMICUS CURIAE

The interests of the Ute Indian Tribe of the Uintah and Ouray Reservation, Utah (the "Tribe") are set forth in the foregoing Motion for Leave to File Brief Amicus Curiae in Opposition to Petition for Writ of *Certiorari* and are incorporated herein by reference.

STATEMENT OF THE CASE

Because the matter presented to the Court for review is of limited applicability and significance, and is a matter which the Court has previously decided with no intervening change in the applicable law, the Court should decline to issue a writ of *certiorari* in this action.

A. Background

In the 1950's, Congress pursued a policy of assimilating Indians into mainstream American society. The prevailing theory, since refuted, was that Indians would prosper socially and economically if their tribal ties were severed.

In pursuit of its policy of assimilation, Congress enacted a series of statutes that terminated federal supervision over select Indian tribes whose members the Secretary of the Interior had deemed capable of competing successfully in society at large. With respect to one tribe, and one tribe only, i.e., the Ute Indian Tribe, Congress terminated federal supervision over some members, but retained the federal government's trust responsibility

over other members of the Tribe. *See* Ute Indian Supervision Termination Act of August 27, 1954, 68 Stat. 868, as amended, codified at 25 U.S.C. §§ 677-677aa (the "Ute Partition Act").[1] Eventually, approximately 27.5 percent of the then-tribal members were terminated as "mixed-bloods".

Before termination, all of the members of the Tribe were the beneficial owners of lands, minerals and other resources located on and under the Uintah and Ouray Reservation. In order to provide for the equitable distribution of those assets between the terminated "mixed-blood" Utes and non-terminated "full-blood" Utes, Congress enacted the Ute Partition Act. The Act "provide[d] for the partition and distribution of the assets of the . . . Tribe . . . between the mixed-blood and full-blood members thereof [and] for the termination of Federal supervision over the trust, and restricted property, of the mixed-blood members of said tribe . . . " 25 U.S.C. § 677.

Approximately 27.5 percent of the Tribe's land and other disposable assets were sold, transferred or conveyed in accordance with the terms of the Ute Partition Act, *see* 25 U.S.C. §§ 677h-677m, with the proceeds benefitting the terminated mixed-bloods. Those "assets not susceptible to equitable and practicable distribution", including "[a]ll unadjudicated or unliquidated claims against the United States, all gas, oil and mineral rights of

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[1] This Court provided a detailed discussion of the terms and history of the Ute Partition Act in *Affiliated Ute Citizens v. United States*, 406 U.S. 128, 132-39 (1972) (hereafter *"Affiliated Utes"*).

every kind, and all other assets not susceptible to equitable and practicable distribution" remained under the supervision of the Secretary of the Interior. *See* 25 U.S.C. § 677i.[2] These indivisible tribal assets were to be jointly managed by the Tribal Business Committee on behalf of the full-bloods and the "authorized representative" of the mixed-bloods. *Id.*

In 1956, the former mixed-blood members of the Tribe initially organized an unincorporated association titled the Affiliated Ute Citizens (the "AUC") as their authorized representative in conformance with the terms of the Ute Partition Act. *See* 25 U.S.C. § 677e; *Affiliated Ute*, 406 U.S. at 135-36. In 1958, AUC's board of directors, in accordance with AUC's constitution, *Affiliated Ute*, 406 U.S. at 135-36, organized the Ute Distribution Corporation (the "UDC") as the authorized representative of the mixed-bloods. The UDC's stated purpose was

> to manage jointly with the Tribal Business Committee of the full-blood members of the Ute Indian Tribe . . . all unadjudicated or unliquidated claims against the United States, all gas, oil and mineral rights of every kind, and all other assets not susceptible to equitable and practicable distribution to which the mixed-blood members of the said tribe . . . are now, or may hereafter become entitled . . . and to receive the proceeds therefrom and to distribute the same to the stockholders of this corporation. . . .

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[2] The assets subject to joint management will be collectively referred to in this brief as the "indivisible tribal assets."

Affiliated Ute, 406 U.S. at 136. Eventually, in January, 1959, AUC's board of directors "irrevocably delegated authority to UDC . . . to accomplish the purposes for which [it] was formed. UDC then issued 10 shares of its capital stock in the name of each mixed-blood Ute. . . . " *Id.* at 136. The shares of stock were freely transferrable and those mixed-bloods who did transfer their stock were prohibited from further participation in the affairs or proceeds of the UDC. *See* UDC Articles of Incorporation, Article VI, *Stock*.[3]

In 1972, this Court consolidated two cases involving the mixed-bloods, AUC and UDC. In the first, *Affiliated Ute Citizens v. United States*, 431 F.2d 1349 (10th Cir. 1970), *aff'd*, 406 U.S. 138 (1972) (hereafter referred to as "*AUC v. U.S.*"), AUC sought division of the Tribe's mineral estate *and* a declaration that it, rather than the UDC was the authorized representative of the mixed-bloods for the purpose of managing indivisible tribal assets. *See Affiliated Ute*, 406 U.S. at 139-40. In the second, *Reyos v. United States*, 431 F.2d 1337 (10th Cir. 1970), *aff'd*, 406 U.S. 128 (1972) (hereafter referred to as "*Reyos*"), individual mixed-bloods sought damages for violations of various securities laws in the sale of their UDC stock and for the Secretary of the Interior's failure to stop the sales. *See Affiliated Ute*, 406 U.S. at 140. The Court recognized that "[t]he two cases, although different, *have their roots in the formation of UDC*. . . . " *Id.* at 141 (emphasis added). The Court went on to hold that:

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[3] The Tribe has a first right of refusal to purchase any UDC shares put up for sale. The Tribe now owns approximately 17.5% of the outstanding UDC stock.

> [c]learly, it is UDC and not AUC that is entitled to manage the oil, gas, and mineral rights with the committee of the full-bloods.

Id. at 144.

B. Nature and Disposition of the Proceedings Below

Petitioners AUC, Glen Mac Murdock and Mac Eugene Murdock filed this action in the Federal District Court for the District of Utah seeking in part to enjoin the Tribe's method of joint management of the indivisible hunting and fishing rights of the Tribe. In support of AUC's authority to request relief against the Tribe, Petitioners once again sought declarations that: 1) AUC, not the UDC, was the authorized representative of the mixed-bloods for the purpose of joint management of the indivisible tribal assets; 2) UDC had no legal power or authority to manage the assets of the mixed-bloods; and 3) UDC had no legal authority to issue or sell stock representing ownership of or a beneficial interest in the indivisible assets. *See* Verified Complaint, *Murdock v. Ute Indian Tribe*, Civil No. 89-C-982G (filed in D. Utah Oct. 30, 1989).[4]

UDC and the United States filed Motions to Dismiss AUC's claim that it was the mixed-bloods' authorized representative, in part based upon the preclusive effect of this Court's determination in *Affiliated Ute* that UDC was the authorized representative of the mixed-bloods for the

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[4] The claim for declaratory relief was directed against the Secretary of the Interior for approving the formation of the UDC and against the UDC itself.

purpose of jointly managing the indivisible tribal assets. The district court agreed and dismissed the claims against the UDC, and the Secretary of the Interior holding that this Court's decision in *Affiliated Ute,* as well as several subsequent lower court decisions,[5] precluded, or collaterally estopped, the Petitioners from claiming that AUC rather than UDC was the mixed-bloods' authorized representative. Order, *Murdock v. Ute Indian Tribe,* No. 89-C-982G, Slip Op. at 3-4 (D. Utah Oct. 19, 1990) (reproduced in Petition for Writ of *Certiorari* at Appendix B).[6]

The district court entered final judgment on the collateral estoppel issue, and Petitioners appealed to the Court of Appeals for the Tenth Circuit. Following an extensive analysis of the application of the doctrine of collateral estoppel, a panel of the Tenth Circuit affirmed the ruling of the district court. The Tenth Circuit held that this Court's opinion in *Affiliated Ute* "precludes the appellants from relitigating [the authorized representative] issue." *Murdock v. Ute Indian Tribe,* 975 F.2d 683, 684 (10th Cir. 1992) (reproduced in the Pet., App. A).

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[5] The decisions relied on by the district court included *Maldonado v. Hodel,* No. 89-4035, Slip Op. (10th Cir. June 28, 1990), *aff'g* 683 F.Supp. 1322 (D. Utah 1988); *Ute Distribution Corp. v. United States,* 721 F.Supp. 1202 (D. Utah 1989), *rev'd on other grounds,* 938 F.2d 1157 (10th Cir. 1991); *Hackford v. First Security Bank,* 521 F.Supp. 541 (D. Utah 1981).

[6] The Petition will hereafter be referred to as "Pet. at ___" and its appendices as "Pet., App. ___".

SUMMARY OF ARGUMENT

The Tribe, in its *amicus* brief, will bring to the Court's attention relevant matters not previously addressed in the Petition. *See* S.Ct. Rule 37.1. The Tribe addresses AUC's claim from its unique perspective as the entity responsible[7] for jointly managing the indivisible tribal assets with the authorized representative of the mixed-bloods and as the owner of 854 shares of UDC stock. For more than 40 years, the Tribe has relied upon AUC's delegation of joint management authority to the UDC. This Court recognized the legitimacy of that delegation in *Affiliated Ute*. The Tribe, and the United States have relied and acted upon that decision in developing *with the UDC* programs and procedures for the joint management of indivisible tribal assets.

AUC presented and fully briefed the authorized representative issue to this Court in *Affiliated Ute*. It recognized that the Court decided the issue when it sought rehearing. AUC cannot now, 20 years after the fact, relitigate an issue that has been unequivocally determined by this Court on the merits. The Tenth Circuit's holding that AUC and its privies are precluded from relitigating the authorized representative issue by virtue of this Court's previous decision on that very issue is clearly correct and the Petition should be denied.

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[7] The Ute Partition Act assigns joint management responsibility to the Tribal Business Committee on behalf of the full-bloods who constitute the Ute Indian Tribe after the effective date of the mixed-blood termination. *See* 25 U.S.C. §§ 677d & 677i.

REASONS THE WRIT SHOULD BE DENIED

A. The Decision of the Tenth Circuit, That AUC is Precluded From Relitigating the Authorized Representative Issue, Is Supported By, and Does Not Conflict With, Other Decisions of This Court and of the Federal Courts on the Identical Issue.

The Tenth Circuit correctly found that this Court's decision in *Affiliated Ute*, 406 U.S. 128, was a final determination on the issue of whether AUC or UDC was the legally constituted representative of the mixed-bloods for purposes of joint management of the indivisible tribal assets. In *Affiliated Ute*, the Court had consolidated two lower-court actions which, Petitioners acknowledge, arose in the same factual context. *See* Pet. at 6.

In *AUC v. U.S.*, 431 F.2d 1349, AUC, on its own behalf and on behalf of the mixed-bloods, brought suit against the United States, seeking, among other things, a determination that AUC and not the UDC was the authorized representative of the mixed-bloods for purposes of joint management of the indivisible tribal assets. *See Affiliated Ute*, 406 U.S. at 139; Pet. at 5.[8] In *Reyos*, 431 F.2d 1337, 85

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[8] AUC maintains that the authorized representative issue "was not raised or decided in the district court, or in the Court of Appeals." *See* Pet at 16. However, earlier in the same Petition, AUC admits that the authorized representative issue *was* clearly before the federal courts in the *Affiliated Ute* case. *See* Pet. at 5 (acknowledging that the plaintiffs in *Affiliated Ute* specifically requested a "determination that the AUC and not the UDC [was] entitled to manage [the mineral estate underlying the reservation] jointly with the business committee of the full blood Utes."). AUC can not have it both ways: either the issue was or was not properly before the courts. Because AUC admits

mixed-blood Utes, all of whom were members of AUC, *see Murdock*, 975 F.2d at 689 (Pet., App. 14), sought relief against, among others, the Secretary of the Interior for damages they allegedly suffered in connection with their sale of UDC stock. The plaintiffs argued that, by not preventing the sale of UDC stock, the Secretary had violated duties he owed the mixed-bloods under the terms of the Ute Partition Act. *See Affiliated Ute*, 406 U.S. at 140, 149-50.

The Court consolidated the *AUC v. U.S.* and *Reyos* cases because "the two cases, although different, have their roots in the formation of the UDC. . . . " *Affiliated Ute*, 406 U.S. at 141. The same attorneys that represented AUC in *AUC v. U.S.* represented the individual plaintiffs in *Reyos* and filed a single brief with this Court in the consolidated case. *See Murdock*, 975 F.2d at 689 (Pet., App. 14). This Court concluded that AUC had lawfully created UDC and had irrevocably delegated to UDC the authority to manage, with the Tribal Business Committee, the mixed-blood Utes' interests in the indivisible tribal assets. 406 U.S. at 136, 144.[9]

Almost 20 years later, AUC argued before the Tenth Circuit that this Court's determination in *Affiliated Ute*

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that *it* raised the authorized representative issue in *Affiliated Ute*, its argument now advanced to this Court that the issue was not properly raised must fail.

[9] The Court concluded its review of the formation of the UDC by holding that "[c]learly, it is the UDC and not AUC that is entitled to manage the oil, gas, and mineral rights with the committee of full-bloods." *Affiliated Ute*, 406 U.S. at 144.

that UDC was the legally created authorized representative was not necessary to a determination of the consolidated cases. *See Murdock*, 975 F.2d at 687-88 (Pet., App. 10-12). However, the Tenth Circuit rejected AUC's argument, and correctly found that

> [i]n order for the [Supreme] Court to evaluate the issue of damages for loss of UDC stock [raised in *Reyos*], the Court had to conclude that the stock was validly issued and had to determine the fair value of that stock. . . . [T]he Supreme Court concluded that the record supported the district court's finding on damages and therefore reinstated it. To reach this conclusion, the Supreme Court also *had to conclude* that the assignment of the indivisible assets to the UDC was proper, for if it were improper, the UDC would have no rights with regard to the indivisible assets, and the stock it issued would have been worthless.

Id. at 688 (Pet., App. 11) (emphasis added).[10]

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[10] Even Justice Douglas, who wrote the dissenting opinion in *Affiliated Ute*, acknowledged that the predicate issue to deciding the claims raised in *AUC v. U.S.* and in *Reyos* was whether UDC was properly created and was lawfully delegated the authority to manage the indivisible tribal assets on behalf of the mixed-blood Utes. *See Affiliated Ute*, 406 U.S. at 158-59 (Douglas, J., dissenting). Unfortunately for the present Petitioners, a majority of this Court disagreed with Justice Douglas' conclusion that UDC had not been properly created as the mixed-bloods' authorized representative.

Justice Douglas also recognized that the plaintiffs and issues in *AUC v. U.S.* and *Reyos* were inextricably linked. He identified the Petitioners as "an unincorporated association of mixed-blood Utes and individuals of that group." *Id.* at 157. "They", he continued, "sought damages, in the District Court,

The Tenth Circuit's analysis conforms to the law of corporations. If UDC had been improperly created, any stock it issued would have been in violation of the law and would have been worthless. *Id. See generally* 11 Fletcher Cyclopedia of Corporations, § 5167 (1986). As a consequence, the *Reyos* plaintiffs would have been entitled to damages for the sale, rather than the fair market value of the stock and would have retained their ownership interest in the indivisible tribal assets. The Court, however, upheld the award of damages based only on the fair market value of the stock, *see Affiliated Ute,* 406 U.S. at 155, necessarily concluding that the UDC had been legally formed and the UDC stock validly issued. *See Murdock,* 975 F.2d at 688 (Pet., App. 11-12). The authorized representative issue was clearly decided in *Affiliated Ute,* and neither AUC nor its privies can once again dispute that issue. *See generally Montana v. United States,* 440 U.S. 147, 153 (1979); 18 Wright, Miller & Cooper, *Federal Practice and Procedure:* Jurisdiction § 4416 (1981); Restatement (Second) Judgments, § 27 (1982).

Without exception, in the intervening 20 years since this Court issued its decision in *Affiliated Ute,* the lower federal courts have concluded, as did the Tenth Circuit in the instant case, that UDC is the duly constituted authorized representative of the mixed-bloods for purposes of joint management of the indivisible tribal assets. *See Maldonado v. Hodel,* No. 89-4035, Slip Op. (10th Cir. June 28,

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for fraudulent securities transactions, for negligence by agents of the Federal Government, and for the deprivation of statutory rights granted them by Congress." *Id.*

1990), *aff'g* 683 F.Supp. 1322 (D. Utah 1988); *Ute Distribution Corp. v. United States*, 721 F.Supp. 1202 (D. Utah 1989), *rev'd on other grounds*, 938 F.2d 1157 (10th Cir. 1991); *Hackford v. First Security Bank*, 521 F.Supp. 541 (D. Utah 1981). AUC has cited to no decisions that conflict with this unanimous rule, such as would justify this Court exercising its discretionary power to review the issue. Similarly, AUC has cited to no intervening law which would cause this Court to reverse its earlier decision. Accordingly, this Court should deny the petition for writ of *certiorari*.

B. The Petitioners in Affiliated Ute Themselves Recognized That This Court Decided the Authorized Representative Issue

As the Tenth Circuit noted: "the AUC [did] not object to the Supreme Court's addressing the [authorized representative] issue; rather, it object[ed] only to the fact that the Supreme Court resolved the issue against it." *Murdock*, 975 F.2d at 690 (Pet., App. 15). This fact is made abundantly clear by a review of AUC's Petition for Rehearing in *Affiliated Ute*.[11]

The petitioners in *Affiliated Ute*, which included AUC, conceded that this Court had determined the authorized representative issue on the merits when they sought a rehearing of that precise issue. AUC began its

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[11] Portions of the Petition for Rehearing are included in this brief as Appendix B. References to the Appendix will be made as "Amicus App. ___".

petition stating: "Petitioners respectfully request rehearing on those aspects of the case dealing with the identity of the 'authorized representative.' " Amicus App. 5. Petitioners then spent several pages disputing the rationale applied by the Court in determining that the UDC had been properly formed. *See, e.g.,* Amicus App. 5-7, 9. Finally, petitioners concluded their request for rehearing by reiterating that: "[d]amages and the 'authorized representative' question, [sic] are those with [sic] which rehearing is requested." Amicus App. 14.

AUC recognized that it had presented the authorized representative issue for the Court's determination and that the Court had, in fact, determined that issue contrary to the wishes of AUC and its privies. Preclusion, or collateral estoppel, applies to issues that are presented and actually determined by the court.[12] AUC presented

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[12]Preclusion generally is appropriate if both the first and second action involve application of the same principles of law to an [sic] historic fact setting that was complete by the time of the first adjudication. 18 Wright & Miller, § 4425.

Clearly, the "historic fact setting" surrounding the formation of UDC as the authorized representative of the mixed-bloods was complete at the time this Court heard and determined *Affiliated Ute.* Petitioners have not alleged any change in the relevant principles of law that would suggest that application of the collateral estoppel doctrine is inappropriate in this case. *See generally* 18 Wright & Miller at § 4425; Restatement (Second) Judgments, § 28. Rather, Petitioners allege that documents, which they purport the government relied upon and misrepresented in *Affiliated Ute, see* Pet. at 16-21, were, until recently, unavailable to AUC. Petitioners apparently claim that these *internal AUC corporate documents, see* Pet., App. 40-47, are newly discovered evidence. *See* Pet. at 16-21. However, "newly

and fully briefed the authorized representative issue, *see Murdock*, 975 F.2d at 690 (Pet., App. 15); this Court determined that issue, and AUC sought a rehearing of that determination, which this Court denied. 407 U.S. 916 (1972); 408 U.S. 931 (1972). For the present Petitioners to now argue that *Affiliated Ute* does not bar relitigation of that same question wholly ignores what actually transpired in this Court some 20 years ago. Simply put, the Tenth Circuit properly determined that AUC and its privies are barred by the doctrine of collateral estoppel from relitigating the authorized representative issue.

The fact that this Court decided the issue contrary to AUC's position *and* declined to reconsider its decision

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discovered evidence normally does not prevent the application of *res judicata*." *Guerrero v. Katzen*, 774 F.2d 506, 508 (D.C. Cir. 1985), *quoting, Dreyfus v. First National Bank of Chicago*, 424 F.2d 1171, 1175 (7th Cir.), *cert. denied*, 400 U.S. 832 (1970). Moreover, AUC Resolution No. 56-66, Pet., App. 46-47, was readily available to AUC during the *Affiliated Ute* proceedings because the United States identified where it was located in its brief. *See* Pet., App. 39, n.8.

AUC now misconstrues these documents, all of which pertain to actions taken by AUC in 1956. Footnote 8 to the Brief of the United States, Pet., App. 39, does not, as AUC claims in its Petition at 16-17, suggest that AUC created the UDC pursuant to Resolution No. 56-66. Rather, it recognizes that, as part of the Plan for Distribution of the *divisible* tribal assets, which was unanimously approved by the AUC membership, AUC contemplated that it would create a corporation for the management of the *indivisible* tribal assets. As this Court found in *Affiliated Ute*, AUC did not undertake to create that corporation until 1958, when it incorporated the UDC. Therefore, the 1956 documents on which AUC now places so much reliance, do not, in any manner, undercut the analysis made by this Court in *Affiliated Ute*.

does not provide grounds for issuing a writ of *certiorari* to reconsider the identical issue more than 20 years later, when there has been no intervening change in the law. Accordingly, this Court should deny the petition for writ of *certiorari*.

C. The Tribe and the Department of the Interior Have Relied on This Court's Determination in Affiliated Ute in Carrying Out Their Obligations Under the Ute Partition Act to Jointly Manage the Indivisible Tribal Assets

The Tribe has jointly managed the indivisible tribal assets with the UDC since 1959, when the AUC board of directors irrevocably delegated authority to the UDC to jointly manage those assets. *See Affiliated Ute*, 406 U.S. at 136. As Justice Douglas noted in his dissent in *Affiliated Ute*, the Bureau of Indian Affairs (the "BIA") acknowledged UDC as the authorized representative following the AUC delegation and, as a result of that acknowledgement, terminated the federal trust relationship with the individual mixed-bloods in accordance with the terms of the Ute Partition Act. 406 U.S. at 159. The validity of the Tribe's management relationship with UDC and the actions taken by the BIA were confirmed by this Court's decision in *Affiliated Ute*.[13]

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[13] Those mixed-bloods who sold or transferred their UDC stock lost their right to participate in the UDC's management of the indivisible tribal assets or in the distribution of funds derived from those assets. The 85 mixed-bloods who brought the action in *Reyos*, who were jointly represented by the AUC's attorney in the proceedings before this Court in *Affiliated Ute*, had all sold UDC stock, albiet for less than its market value. This

The Tribe has relied on this Court's decision and has jointly managed the indivisible assets with the UDC rather than with the AUC. The United States relied on the decision when it enacted regulations governing the joint management of the indivisible tribal assets which recognized the UDC as the authorized representative of the mixed-bloods. *See* 25 CFR Part 217, added 43 Fed.Reg 40458 (1978). Those regulations provide that:

> In accordance with the Ute Partition Act . . . assets shall be managed jointly by the business committee and the board of directors [of the Ute Distribution Corp.]. These regulations set out the procedures for exercising such joint management.

25 CFR § 217.2.

Court recognized, however, that the mixed-bloods were free to sell their UDC stock and, thereby, discontinue their interest in the management of the indivisible assets. *See generally Affiliated Ute, supra.*

In its Petition, AUC and the individual petitioners claim that "the important and substantial statutory rights of the mixed blood Utes to have a meaningful voice in the management of their interests in the undivided assets of the Ute Indian Tribe, and to preserve these assets from unlawful alienation and dissipation by the UDC without due process of law, will be reduced to a mere footnote in history." Pet. at 21. To the extent that the individual mixed-bloods retain their stock in UDC, they most certainly maintain a meaningful voice in the management of their interests in the indivisible assets. Moreover, to the extent those individuals with UDC stock believe that the UDC has mismanaged their interests, they are free to pursue a stockholders' derivative action against the UDC for mismanagement. This, not the relitigation of whether the UDC was properly formed, is the method by which individual mixed-bloods can protect their interests.

Finally, the lower courts during the past 20 years have, without exception, found that AUC and its privies are precluded from relitigating the authorized representative issue.[14] This Court should not upset what was clearly settled in 1972, by now allowing AUC and its privies to relitigate the identical issue it lost in *Affiliated Ute.*

CONCLUSION

For the reasons stated above, this Court should deny the petition for writ of *certiorari.*

Respectfully submitted,

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[14] *See Murdock,* 975 F.2d at 685, n.3 (Pet., App. 4-5, n. 3); note 5 *supra;* and discussion *supra* at 11-12.

APPENDIX A

[SEAL]

U.S. Department of Justice
Office of the Solicitor General

Washington, D.C. 20530

February 8, 1993

Robert S. Thompson, III
Whiteing & Thompson
1136 Pearl Street, Suite 203
Boulder, Colorado 80302

Re: *Glen Mac Murdock, Jr.* v. *Ute Distribution Corporation, a Utah Corporation; Manual Lujan, Jr., Secretary of the United States Department of the Interior,* No. 92-1149

Dear Mr. Thompson:

This is in response to your letter of February 5, 1993.

On behalf of the United States I hereby consent to the filing of a brief as *amicus curiae* on behalf of the Ute Tribe in the above case.

Sincerely,
/s/ William C. Bryson/Illegible
William C. Bryson
Acting Solicitor General

[SEAL] U.S. Department of Justice

KWH
90-2-4-1650

Washington, D.C. 20530

February 8, 1993

The Honorable William H. Rehnquist
Chief Justice
United States Supreme Court
One First Street, N.E.
Washington, D.C. 20543

Dear Mr. Chief Justice:

RE: *Glen Mac Murdock, Jr., et al. v. Ute Distribution Corporation, a Utah Corporation; Manuel Lujan, Jr., Secretary of the United States Department of the Interior, No. 92-1149, On Petition for Writ of Certiorari to the Supreme Court of the United States*

Pursuant to Supreme Court Rule 36.1, this letter serves as the respondent, United States' written consent to the Ute Indian Tribe filing a brief *amicus curiae* in the above-captioned action throughout these proceedings, including the period prior to this Court's consideration of the petition for writ of *certiorari*.

Sincerely,

/s/ Katherine W. Hazard,
Katherine Hazard, Esquire
Attorney, Appellate Section
Environment and Natural Resources Division
Department of Justice
P.O. Box 23795
(L'Enfant Station)
Washington, D.C. 20026

The Honorable William H. Rehnquist
Chief Justice
United States Supreme Court
One First N.E.
Washington, D.C. 20543

Re: *Glen Mac Murdock, Jr., et al. v. Ute Distribution Corporation, a Utah Corporation; Manual Lujan, Jr., Secretary of the United States Department of the Interior,* No. 92-1149, On Petition for Writ of *Certiorari* to the Supreme Court of the United States

Dear Mr. Chief Justice:

Pursuant to Supreme Court Rule 36.1, this letter serves as the respondent Ute Distribution Corporation's written consent to the Ute Indian Tribe filing a brief *amicus curiae* in the above-captioned action throughout these proceedings, including the period prior to this Court's consideration of the petition for writ of *certiorari.*

Sincerely,

/s/ Max. D. Wheeler
Max D. Wheeler, Esq.
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for Respondent
10 Exchange Place,
Eleventh Floor
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84145-5000

APPENDIX B

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-78

AFFILIATED UTE CITIZENS OF THE STATE OF UTAH, ET AL.,

Petitioners,

-v.-

UNITED STATES, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR REHEARING

Petitioner AUC and Reyos jointly petition for rehearing on the decision on the merits dated April 24, 1972, as to questions left open by the opinion and which the Court should either resolve or permit the District Court to examine on remand, and as to apparent inconsistencies in the AUC portion of the case.

I
THE IMPACT OF THE DECISION ON THIS NATION'S OBLIGATIONS TO INDIANS AND THEIR LANDS SHOULD BE RECONSIDERED

Petitioners respectfully request rehearing on those aspects of the case dealing with the identity of the "authorized representative." These portions of the opinion reflect fundamental mistakes of law and fact which, if not corrected, may impair the rights of all Native Americans in matters extending far beyond the issues of this case. This Court, as so often in the past, represents the last hope that these first Americans have to require that this country's commitments to them be honored. Surely such a matter is of sufficient importance to justify rehearing.

We must seek to demonstrate to them that society is responsive to their patient pleas and help them to live among us in prosperity, dignity and honor.

-PRESIDENT RICHARD M. NIXON*

In response to the dilemma posed by the Petition of whether BIA can alter the termination procedures prescribed in acts of Congress, the opinion replies that because "section 6 of the Act, 25 U.S.C. §677e, authorized the mixed-bloods to organize, to adopt a constitution and by laws, and to provide, by that constitution, for the

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* From an address to the National Congress of American Indians, Omaha, Nebraska, 1968, quoted at COMMONWEAL, 4 Sept., 1970, at 432.

selection of authorized representatives," and because the Constitution thus adopted provided that a "quorum" shall consist of twenty-five voters (E. 161), the requirements of Section 6, 25 U.S.C. §677e, of "a majority vote of the adult mixed-blood members at a special election authorized and called by the Secretary" for the valid formation of a common organization were superseded. The opinion thus answers Petitioners protest against high handed bureaucratic action (See Reply Brief for Petitioners, pages 8-11) with the suggestion that is *some* of the Indians (who the Act contemplated were of limited ability at best) concurred, a disregard of the Act's requirements may be sanctioned. If Congress' specification of a "majority" of the 490 persons who were adults may be thus changed to 25, what limits to such arbitrary rewriting of Congressional mandates are then permissible? May BIA, or an officious Indian leader (or in this case, the tribal attorney), substitute the judgment of a single person, or perhaps eliminate any referendum at all?

It is unthinkable – literally – that these unlettered terminated Utes could conceptualize the fine spun reasoning which the opinion has advanced to justify substitution of the clear mandate of the Act. The opinion effectively means that persons who are legally wards of the state may be *estopped* to assert their rights under an act of Congress, which surely introduces a new and dangerous rubric into the law.

I am an Indian and am looked on by the whites as a foolish man; but it must be because I follow the advice of the white man.

-SHUNKA WITKO (FOOL DOG)*

Alternatively, the opinion proposes that because the AUC Constitution in Article V, §1(b) empowered the board of directors to delegate "to corporations organized in accordance with the Act" powers necessary to accomplish their purposes, and because AUC adopted Resolution 59-8 purporting to delegate the powers of Article V, §1, paragraph (b), UDC is therefore the "authorized representative" (Op. 4). This analysis ignores that (1) UDC was not "organized in accordance with the Act" as the opinion assumes. The only corporations authorized by the Act were those "for the grazing of livestock, [and] handling of water and water rights." (See 25 U.S.C. § *677l* (3) and Reply Brief for Petitioners 23-24). The analysis also ignores that (2) the authorized representative power was contained in paragraph (a) of the section rather than paragraph (b) (See Reply Brief for Petitioners 29-30), and was therefore not delegated.

What the opinion does not dispose of, which is relevant to the Court's conclusion, is whether it is fair or reasonable for the terminated Utes to be thus charged with the loss of their heritage. They did not author the disputed resolution or conceptualize the effect this Court has now attached to it. They merely executed documents

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* Quoted at BROWN, BURY MY HEART AT WOUNDED KNEE 274 (1970).

presented to them by the tribal attorney, who was also installed as their attorney by BIA. The appearance of that same attorney herein, in opposition to the vital interests of his former clients and in disregard of his solemn covenant with them that he would not do so (See Reply Brief for Petitioners, 14 at note 14), is a circumstance which should bear heavily on whether the terminated Utes may be charged by his acts with the presumption that they intended to abandon Congress' safeguards.

In this connection, Petitioners point in requesting that they be referred to as "terminated Utes" was evidently not well communicated (see Op. 2, at footnote 3). To put the matter more bluntly, the use of such a term by the draftsman of the Act, with its obvious racial overtones, is but symptomatic of the calculated disregard of the terminated Ute's rights in every step of the termination program, including the formation of UDC. The author of that slur was the tribal attorney. Though the Act was adopted by Congress, whose intent must control its doubtful provisions, it was the tribal attorney who was its author. He – not BIA – authored the deviation from the plan Congress sanctioned, when he formed UDC. It was he who purported to serve as legal counsel to *both* sides in the partition of a veritable fortune. *Cf. Luke* 16:13. May such important rights, perhaps, with the entire course of Indian history hanging in the balance, be treated so casually? Should the questionable practices of one mere man not only be given the force of positive law, but be construed in the manner most prejudicial to the interest of the clients he supposedly served? General moral concepts – as well as the ABA Code of Professional Conduct – should preclude such a result.

In holding the terminated Utes strictly accountable for (1) this "resolution adopted with a 42-5 vote," or (2) the adoption of Resolution 59-8 by the vote of 5 Indians, notwithstanding the Act's requirements of a majority vote of adults, the Court has failed to recognize the implication of the Acts promise that the Secretary would approve their "choice of counsel and fixing of fees," 25 U.S.C. §677f. That promise undoubtedly engendered confidence in the terminated Utes that the attorney thus selected for them would *faithfully* apply the safeguards written into the Act.

These matters were given too little attention in the opinion. Particularly in conjunction with the persons of limited abilities being forced to rely on counsel having such a conflict, they present matters warranting inquiry on rehearing.

They made us many promises, more than I can remember, but they never kept but one; they promised to take our land, and they took it.

-MAPHIUA LUTA (RED CLOUD)*

What the terminated Utes *could* understand was the constantly repeated promise of the Act that the Secretary would see that everything was done properly; by protecting the rights of members "in need of assistance," 25

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* Quoted at BROWN, BURY MY HEART AT WOUNDED KNEE 448 (1970).

U.S.C. §677u; by assisting them "in preparing for termination," 25 U.S.C. §677; by proceeding in the manner he deemed in their best interest, 25 U.S.C. §677aa; by providing them with assistance on request and approving their plan for distribution of assets, 25 U.S.C. §677i; by approving trustees and the terms and conditions of trust, 25 U.S.C. §677l(4); and certifying that changes in their status were not detrimental, 25 U.S.C. §677c. These Indians had been nurtured on a system in which the Government supervised their every deed, and such promises led them to believe that it would continue to do so in at least these particulars. The failure of the opinion to recognize and implement these promises, and others which appear in the legislative history, should be reconsidered. If they are not, the entire Indian community may have its confidence shattered. Once more, Indian rights will be unsettled. Once more, serious questions will be raised about whether the Government may be trusted where Indian rights are concerned.

Sapaniese Cuch stated . . . that land was eternal and belonged to a person even though dead, that it was part of their birthright, the same as they passed on their own blood to their children; that the land was theirs, and that . . . they should not be disturbed in what little they had left.

-MINUTES OF A MEETING OF THE WHITE ROCKS COMMUNITY OF UTE INDIANS, March 14, 1945

The Indian's land base is of importance to him far beyond its mere economic value. To the Indian, land is a

way of life, his religion, the stuff of which Indian culture is made. Congress, and President Nixon, have recognized these facts, and made them a part of our national policy, such as in the return of 48,000 acres of valuable forest lands and the sacred Blue Lakes to the Taos Pueblo's in December 1970 with the declaration that "this will mark one of those periods . . . that we started on a new road which led us to justice in the treatment of those who were the first Americans . . . " Washington Post, Dec. 16, 1970 at 27, col. 1.

The implicit assumption of the opinion that these Indians, or any Indians, knowingly and intentionally surrendered control of their lands to a corporation now owned by non-Indians, or that they understood that their stock sales would have that effect, is a conclusion at odds with the President's "new road" policy and one which should be reexamined.

The implications are devastating. The terminated Utes have litigation pending in the Court of Claims seeking compensation for their lost hunting and fishing, timber and water rights. See *Affiliated Ute Citizens v. United States*, No. 156-69 (United States Court of Claims). The Menominee, and perhaps other Indian groups, have similar claims pending. Shall it be *assumed* that they voluntarily surrendered their rights, with no hearing on the merits at all? That could well be the effect of the opinion, and the end of the President's new road of justice.

There may be a temptation for those of us who are the product of a culture which emphasizes personal property values to view the spectre of chaos in Reservation oil

and gas leasing suggested by the tribal attorney (Defendant Interveners Br. 3) as an impediment to recognition of *the aspirations of the terminated Utes* which spring from their own culture. Undesirable consequences for the Reservation land policies if AUC's rights as authorized representative are recognized could occur *only* if one assumes bad faith on the part of AUC. There is no foundation for such an assumption. But what of the consequences for the remainder of this nation's Indian citizens if we do not hazard that risk? Is this nation not big enough to recognize these rights? Shall the cultural values of this small group be sacrificed to massive oil interests?

Even if there could be some basis in the Record for assuming bad faith on the part of the terminated Utes, this Court is not powerless to devise appropriate relief. A *prospective* recognition of AUC's rights, limited as to its retroactive effect, would avoid the fears contrived in the tribal attorney's brief, yet do substantial justice to the Indian petitioners.

-an interest in people, rather than things; a strong sense of community; a need to share our lives with others; a dignity in harsh surroundings; a sympathetic, non-exploitive love for nature; and taking the measure of a man not by what he has, or looks like, or says, but by what he is.

You and I know these things. But too many other Americans do not.

-SENATOR EDWARD M. KENNEDY*

AUC does not propose a mere reargument of that which has now been rejected. What is requested is an inquiry into the unique nature of the Indian personality as it bears upon the issues of this case. Such an inquiry, which was impossible within the scope of legal briefs on the merits, will demonstrate that even if the purport of the disputed resolutions was as the Court has concluded, they should nevertheless not be read quite so literally. That is so because Indian customs do not admit of such a rigid reading, in which importance is attached to particular words such as the opinion attaches to the term "powers . . . necessary or desirable in the accomplishment of the objects and purposes for which said corporations may be organized" (Op. 4). Surely the meaning of these acts in the eyes of the Indian is a fundamentally important inquiry. Such inquiry is possible now that the scope of the issues has been reduced.

The query of Mr. Justice Marshall at oral arguments as to just how long we must continue to protect our Indian brothers was most appropriate. Time was not available to respond adequately. The answer, which we propose to supply on rehearing, lies in the distinct culture of the Indian, with its emphasis on non-exploitive sharing of lives and things.

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* From an address to the National Congress of American Indians, Albuquerque, New Mexico, October 7, 1969.

If a compulsory cultural change is the answer, which is simultaneously the basic assumption and fundamental weakness of termination, such change cannot be wrought in this generation. This generation of Native Americans was nurtured on bureaucratic paternalism. Such persons should not be presumed to have intended more than Congress prescribed. The inquiry which AUC proposes will reveal that they relied, as they had a right to do, on their belief that Congress' devices for their protection would be respected. This Court should require that their natural expectations be honored.

* * *

CONCLUSION

Petitioners do not seek rehearing on all aspects of the opinion. The findings that the government is not liable, and that the terminated Utes are not entitled to a pro-rata distribution of the minerals, are findings with which AUC disagrees, but does not challenge.

Damages, and the "authorized representative" question, are those with which rehearing is requested. The former should be corrected without formal argument, for they represent simple oversights. The latter should be scheduled for briefing and argument concerning the social implications of the opinion – questions which have not been disposed of or briefed in depth to date.

* * *